

### REMARKS

This Application has been carefully reviewed in light of the Final Office Action mailed May 2, 2008. At the time of the Final Office Action, Claims 1-26 were pending in this Application. Claims 1-26 were rejected. Claims 1, 8, and 15 have been amended. Applicants respectfully request reconsideration and allowance of pending Claims 1-26.

#### **Request to Withdraw Finality of Office Action**

Applicants submit that the finality of the May 2, 2008 Final Office Action is not appropriate, and request that the office action be revised to a non-final office action. For example, Claim 1 was rejected under different prior art than in the October 19, 2007 non-final office action, and only a minor amendment was made to Claim 1 to correct a clerical error -- which did not require a new search -- after the October 19 non-final office action.

Attorney for Applicants, Mr. Eric Grabski spoke with Examiner Gillis regarding this issue on August 4, 2008, and Examiner Gillis agreed that the May 2, 2008 Final Office Action should have been entered as a non-final office action, and suggested that Applicants include this request to withdraw the finality of the office action, for the official record. Applicants thank the Examiner for his consideration regarding this issue.

#### **Rejections under 35 U.S.C. § 101**

Claims 8-14 and 23-24 were rejected under 35 U.S.C. §101 because the claimed invention is directed to non-statutory subject matter. Although Applicants disagree with the rejections under 35 U.S.C. §101, in order to advance prosecution Applicants have amended independent Claim 8 to recite:

- a receiver module including logic instructions stored in tangible computer-readable media and operable to receive communications governed by at least two network protocols;
- a performance data module including logic instructions stored in tangible computer-readable media and associated with the receiver module, the performance data module operable to obtain network performance data for the at least two network protocols; and
- a dynamic switching module including logic instructions stored in tangible computer-readable media and associated with the performance data module, the dynamic switching module operable to monitor performance data and dynamically switch between network protocols based on the network performance data. (emphasis added)

Amended independent Claim 8 is directed to statutory subject matter. According to M.P.E.P. § 2106.01:

Descriptive material can be characterized as either “functional descriptive material” or “nonfunctional descriptive material.” In this context, “functional descriptive material” consists of data structures and computer programs which impart functionality when employed as a computer component. (The definition of “data structure” is “a physical or logical relationship among data elements, designed to support specific data manipulation functions.” The New IEEE Standard Dictionary of Electrical and Electronics Terms 308 (5th ed. 1993).) “Nonfunctional descriptive material” includes but is not limited to music, literary works, and a compilation or mere arrangement of data. (emphasis added).

According to such standards, Claim 8 clearly recites “functional” rather than “non-functional” descriptive material. Applicants then refer the Examiner back to M.P.E.P. § 2106.01, which explains:

. . . When functional descriptive material is recorded on some computer-readable medium, it becomes structurally and functionally interrelated to the medium and will be statutory in most cases since use of technology permits the function of the descriptive material to be realized. Compare *In re Lowry*, 32 F.3d 1579, 1583-84, 32 USPQ2d 1031, 1035 (Fed. Cir. 1994)(discussing patentable weight of data structure limitations in the context of a statutory claim to a data structure stored on a computer readable medium that increases computer efficiency) and *Warmerdam*, 33 F.3d at 1360-61, 31 USPQ2d at 1759 (claim to computer having a specific data structure stored in memory held statutory product-by-process claim) with *Warmerdam*, 33 F.3d at 1361, 31 USPQ2d at 1760 (claim to a data structure *per se* held nonstatutory). (emphasis added).

Amended Claim 8 recites a system including three modules, each module “including logic instructions stored in tangible computer-readable media.” According to the M.P.E.P. guidelines, amended Claim 8 recites “functional descriptive material ... recorded on some computer-readable medium,” and is therefore statutory.

For at least these reasons, Applicants respectfully request the Examiner withdraw the rejections under 35 U.S.C. §101, and allow amended Claim 8, and Claims 9-14, 23, and 24 that depend from Claim 8

**Rejections under 35 U.S.C. § 102**

Claims 1-26 were rejected by the Examiner under 35 U.S.C. §102(e) as being anticipated by U.S. Patent No. 6,801,777 issued to Leslie A. Rusch ("*Rusch*").

Applicants respectfully submit that *Rusch* does not teach every element of Applicants claims as amended. For example, amended Claim 1 recites, in part:

while conducting network communications with the first network protocol, automatically determining whether switching from the first network protocol to the second network protocol would improve performance for the client system; and

in response to determining that switching to the second network protocol would cause improved performance for the client system, automatically switching from the first network protocol to the second network protocol;

providing a user interface for receiving an instruction from a user to switch network protocols;

in response to receiving an instruction from a user to switch to another particular protocol, switching from the second network protocol to the particular network protocol, regardless of whether switching from the second network protocol to the particular network protocol would improve performance for the client system.

(emphasis added)

*Rusch* does not teach a system that switches network protocols both (a) automatically upon determining that switching would improve system performance, and (b) in response to a user instruction to switch protocols, regardless of whether such switch would improve system performance.

Applicants remind the Examiner that "[a] claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631, 2 U.S.P.Q.2d 1051, 1053 (Fed. Cir. 1987). Furthermore, "the identical invention must be shown in as complete detail as is contained in the ... claim." *Richardson v. Suzuki Motor Co. Ltd.*, 868 F.2d 1226, 1236, 9 U.S.P.Q.2d 1913, 1920 (Fed. Cir. 1989). *Rusch* does not disclose each and every element of amended Claim 1, and does not show the "identical invention" as amended Claim 1.

For at least these reasons, Applicants respectfully request reconsideration and allowance of amended Claim 1, as well as all claims that depend from Claim 1. In addition, for analogous reasons, Applicants respectfully request reconsideration and allowance of amended independent Claims 8 and 15, as well as all claims that depend from Claims 8 and 15.

### CONCLUSION

Applicants have made an earnest effort to place this case in condition for allowance in light of the amendments and remarks set forth above. Applicants respectfully request reconsideration of the pending claims.

Applicants believe there are no fees due at this time; however, the Commissioner is hereby authorized to charge any fees necessary or credit any overpayment to Deposit Account No. 50-2148 of Baker Botts L.L.P.

If there are any matters concerning this Application that may be cleared up in a telephone conversation, please contact Applicants' attorney at 512.322.2689.

Respectfully submitted,  
BAKER BOTTS L.L.P.  
Attorney for Applicants



Eric M. Grabski  
Reg. No. 51,749

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SEND CORRESPONDENCE TO:  
BAKER BOTTS L.L.P.  
CUSTOMER NO. **23640**  
512.322.2599  
512.322.8383 (fax)